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IN THE

Supreme Court of the United States

RONALD J. DRUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court, in ruling upon a request for a downward departure under the Sentencing Guidelines on the ground of aberrant behavior by a criminal defendant who has pled guilty to a non-violent crime, is without authority to grant such a departure unless the defendant's criminal behavior consisted of one act which was spontaneous and seemingly thoughtless.

2. Whether a sentencing court has the authority under the Sentencing Guidelines to consider the victim's wishes and desires in ruling upon a criminal defendant's request for a downward departure.

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Appendix B — Judgment Of The United States District Court For The Southern District Of Florida Dated August 30, 1995 And Filed August 31, 1995 ..... 10a

Ronald J. Drucker, by and through counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-9a) is an unpublished opinion and thus is not reported. The judgment of the District Court (App. B, *infra*, pp. 10a-16a) is likewise unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals (App. A, *infra*, pp. 1a-9a) was entered on September 27, 1999. No motion for rehearing from the judgment of the court of appeals was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

18 U.S.C. § 3553(b) provides as follows:

> (b) **Application of guidelines in imposing a sentence.** — The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court

> shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

1995 U.S.S.G., Chapter 1, Part A, Section 4(d) provides in pertinent part:

> * * * The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

1995 U.S.S.G., § 5K2.0 provides in pertinent part:

> Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that

> may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. * * *

STATEMENT OF THE CASE

On August 23, 1994, Petitioner Ronald J. Drucker was named in a single count information charging use of the mails to forward letters containing certain threats to injure the reputation of an individual(s) with the intent to extort $20,000 in violation of 18 U.S.C. § 876.

On December 2, 1994, Mr. Drucker signed a plea agreement with the government referencing the information and then entered a guilty plea to the charge. Pursuant to the agreement and among other provisions the government was to recommend both that Mr. Drucker's sentence be computed pursuant to 1995 U.S.S.G. § 2B3.3 (*Blackmail and Similar Forms of Extortion*) and that Mr. Drucker's sentence be imposed at the low end of the applicable range including that such sentence might be satisfied by a sentence of

probation pursuant to 1995 U.S.S.G. § 5C1.1(c)(3) (*Imposition of Term of Imprisonment*).

The district court accepted the plea and ordered that a Presentence Investigation Report (PSI) be prepared. The facts contained in the PSI were stipulated as being accurate by both Mr. Drucker and the government. Those facts showed that during the period between July 23, 1993 and August 23, 1993, Mr. Drucker forwarded approximately seven (7) mailings to Charles J. Kane, an attorney, consisting of letters which had messages crafted with words cut out of magazines and newspapers and/or produced by a label maker. The messages contained various threats to Mr. Kane and demands for money relating to the exposure of embarrassing information, video tapes and/or pictures depicting the sexual activities of Sally Labuy, a woman with whom Mr. Drucker had been romantically involved and who was then in a relationship with Mr. Kane. The letters referenced turning the information and materials over to Mr. Kane's clients and the bar association. One of the letters asked for $150,000 for the video tapes and contained instructions for dropping off the monies, while subsequent mailings sought $20,000 along with such instructions.

Mr. Kane contacted the Federal Bureau of Investigation (FBI) which placed Mr. Drucker under surveillance, observing him on two occasions in the vicinity of the planned drop off area. No monies were ever exchanged. Subsequent to the receipt of the final letter with its repeated request for $20,000, Mr. Kane contacted an attorney for Mr. Drucker to inform him of the FBI's involvement in the matter. No additional items were mailed by Mr. Drucker after that communication. Based upon this offense conduct, the PSI reflected a Total Offense Level of 19 which, when combined

with Mr. Drucker's Criminal History Category I, yielded a sentencing guideline range of 30-37 months.[1]

Trial counsel for Mr. Drucker forwarded a sentencing memorandum to the district court on February 1, 1995, containing Mr. Drucker's objections to the PSI. The sentencing memorandum also submitted that downward departure was warranted from the otherwise applicable guideline range on the grounds that Mr. Drucker's offense constituted aberrant behavior and was the result of diminished capacity.

The government also submitted objections to the PSI concurring with Mr. Drucker's positions regarding the level increases suggested by the PSI's author. It was the government's position, together with Mr. Drucker, that the proper calculation resulted in an offense level of 10 with 6-12 months being the appropriate sentencing range. The author of the PSI submitted an addendum to the PSI responding to Mr. Drucker's and the government's objections reaffirming his position on the level increases and arguing against the departure grounds submitted by defense counsel.

The initial sentencing hearing occurred on April 21, 1995. After hearing from the parties and the probation officer, the district court first determined that 1995 U.S.S.G. § 2B3.3 was the appropriate guideline to be applied in the case. (T. I, 16-19).[2] After further argument concerning whether

1. Since the maximum term of imprisonment for a violation of 18 U.S.C. § 876 is not more than two years, the guideline range thus became 24 months.

2. The transcript reference "T. I" is to the transcript of the proceedings held in the United States District Court for the Southern District of Florida on April 21, 1995.

for sentencing purposes the relevant extortion amount was $20,000 or $150,000[3], with both Mr. Drucker and the government arguing for the $20,000 figure, the district court ruled that based on the preponderance of the evidence standard, the applicable amount was $150,000 (T. I, 24). On the basis of the concern raised by defense counsel that Mr. Drucker had had inadequate notice of the applicability of the $150,000 figure, the court adjourned the sentencing proceedings to permit the parties to explore issues related to the possibility of a withdrawal of Mr. Drucker's plea. (T. I, 31).

Prior to the reconvening of the sentencing hearing, defense counsel forwarded an addendum to his sentencing memorandum in which he raised two additional grounds for downward departure, one being the victim's wishes that Mr. Drucker not be imprisoned and the other being that the case was outside the "heartland" of cases involving threatening communications resulting in the guidelines overstating the seriousness of the offense. On the issue of the victim's wishes, defense counsel cited 18 U.S.C. § 3553(b) and 1995 U.S.S.G. § 5K2.0 and provided the district court a copy of an August 18, 1995 letter from Mr. Kane to the court in which the victim indicated that he did not want Mr. Drucker to go to prison and that Mr. Drucker should receive probation conditioned on his leaving Mr. Kane and Ms. Labuy alone.

Sentencing was reconvened on August 25, 1995. In support of Mr. Drucker's request for downward departure on the basis of aberrant behavior and diminished capacity, defense counsel presented the testimony of Dr. Glenn Ross

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3. The information set the amount at $20,000 although the first demand was for $150,000, later reduced.

Caddy, a clinical and forensic psychologist who had been seeing Mr. Drucker for evaluation, therapy and counseling. Dr. Caddy described for the court the background of Mr. Drucker's relationship with Ms. Labuy and the significant consequences for him of his learning about the other men in her life. He indicated that Mr. Drucker sought

> to try to punish her by punishing Mr. Kane . . . [I]f he were to reveal what he knew of her to Mr. Kane, that would not only hurt their relationship, but it would principally hurt the woman because [Mr. Drucker] suspected that Mr. Kane may drop this relationship once he knew some of these items.

(T. II, 21).[4] Additionally, in this same vein, Dr. Caddy testified that Mr. Drucker was not really trying to get any money from Mr. Kane but, rather, it was "harassment rather than the specific dollar figure that was driving his conduct." (T. II, 48). Dr. Caddy also characterized Mr. Drucker's acts as more of a tantrum than a specific plan to get something from Mr. Kane and Ms. Labuy and described his basis for considering Mr. Drucker's acts as aberrant behavior. (T. II, 23, 27-32, 57-58).[5]

On the issue of aberrant behavior, defense counsel argued to the court 1995 U.S.S.G. Chapter 1, Part A, Section 4(d) and the cases of *United States v. Takei*, 941 F.2d 738 (9th

4. The transcript reference "T. II" is to the transcript of the sentencing proceedings held in the United States District Court for the Southern District of Florida on August 25, 1995.

5. At the time of the offense Mr. Drucker was over 60 years old, was a successful businessman and had no criminal record.

Cir. 1991) and *United States v. Fairless*, 975 F.2d 664 (9th Cir. 1992), for the proposition that in analyzing the issue of aberrant behavior the district court should look at the totality of the circumstances to determine whether Mr. Drucker's actions constituted a single act of aberrant behavior within the aberrant behavior spectrum discussed in those cases. In response, the government cited the line of cases in various circuits, including the Fourth, Seventh, Eighth and Eleventh which reject the approach of the Ninth Circuit and which apply the approach represented by the case of *United States v. Andruska*, 964 F.2d 640 (7th Cir. 1992) which limits the definition of "single acts of aberrant behavior" to a single, spontaneous and seemingly thoughtless act.

The district court denied Mr. Drucker's request for a downward departure on the basis of aberrant behavior holding as follows (T. II, 69-70):

> Now, the 9th Circuit case, I think, is probably the most expansive reading of aberrant behavior.
>
> The 4th Circuit in United States versus Glick, 946 F.2d 335, is the other side, if you will, and it is the opinion that was cited with approval in the Seventh Circuit's opinion in the United States versus Andrews [sic] at 964 F.2d 640 at Page 645.
>
> The 4th Circuit in Glick said that aberrant behavior means something more than merely a first offense.
>
> A single act of aberrant behavior suggests a spontaneous and seemingly thoughtless act rather than one which was the result of one of substantial

> planning because an act which occurs suddenly, and is not the result of a continued reflective process, is one for which Defendants may be arguably less accountable.
>
> Looking at the presentence investigation, it is clear that the activities here are out of character. There is no question about it.
>
> But I do not think that that is the equivalent of a single aberrant act, as that term is used in the guidelines.
>
> So, I will deny the motion for downward departure based on a finding of single aberrant behavior, or of aberrant behavior within the meaning of the guidelines.

Through the rest of the sentencing proceeding the district court made additional comments to the effect that Mr. Drucker's actions were out of character, would not have occurred but for Mr. Drucker's particular emotional turmoil and were not likely to be repeated. (T. II, 94, 109).

On Mr. Drucker's request for downward departure on the basis of the victim's wishes, the government, while seeming to argue that the district court could consider a victim's request for a maximum sentence as a ground for upward departure, took no position on whether the victim's wishes in this case could form the basis of a downward departure. (T. II, 88-89). In denying a downward departure on the basis of the victim's wishes, the district court held as follows (T. II, 103-105):

I think that the Court must consider, and it is a highly relevant factor, that the victim has made his expression.

Certainly, the Court would need to consider the victim's wishes if they were the opposite.

But I don't think someone realistically would say that this Court could depart upward if a victim walked in in a sense of outrage and anger, as justified as that might be, to go up above the guideline because the victim impact is one of those factors that has been considered and made a part.

On the other hand, in selecting a sentence within the guideline range, it seems to me highly relevant when a victim comes forward and says, these are my views. This is what I would think would be adequate. I would be satisfied and so forth.

I think the Court can certainly consider that, in particular, in those situations where the victim is saying, I'm satisfied with a lighter sentence rather than a higher sentence.

And I think that that is especially true where the crime is not a crime. That it could have been another victim rather than this victim.

I think [defense counsel's] suggestion that this is such a focused crime adds additional strength to that argument.

> So, I will consider Mr. Cane's [sic] letter, and I will consider it with respect to where on the guideline the appropriate sentence should be. But I will not utilize it to depart from the guidelines.

Having rejected all of Mr. Drucker's requests for a downward departure, the court calculated a Total Offense Level of 13 with a Criminal History Category of I resulting in a guideline range of 12-18 months. The court sentenced Mr. Drucker to 12 months imprisonment with a $15,000 fine.

After sentence was imposed the government asked the court generally to confirm that its rulings on the defense requests for downward departure were based on the facts and not that the court felt it did not have the authority to conduct such a departure. The court responded that that was correct. (T. II, 115).

Mr. Drucker appealed the judgment of the district court to the United States Court of Appeals for the Eleventh Circuit invoking that court's jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. In the Eleventh Circuit Mr. Drucker raised the issues of the district court's enhancement of the base offense level by using the $150,000 figure and the court's determination that the victim's wishes could not form the basis for a downward departure.[6] The Eleventh Circuit affirmed the district court's judgment ruling, with respect to the issue of the victim's wishes, that the district

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6. The aberrant behavior issue was not raised in the Eleventh Circuit inasmuch as by the time of the submission of the briefs to the appellate court the Eleventh Circuit had clearly adopted the position of the Seventh Circuit relied upon by the district court on the issue of aberrant behavior. *See United States v. Withrow*, 85 F.3d 527 (11th Cir. 1996), *cert. den.*, 519 U.S. 944 (1996).

court's decision was based on its view of the facts and not on a view that it lacked authority to consider the victim's wishes as a basis for downward departure.[7]

REASONS FOR GRANTING THE WRIT

This case presents questions concerning the authority of district courts in the application of the Sentencing Guidelines that are of great importance to the administration of criminal justice. With respect to a district court's authority to grant a downward departure on the basis of a defendant's aberrant behavior, there exists conflict among the various United States Courts of Appeals in the interpretation of the Sentencing Guidelines, as well as this Court's decision in *Koon v. United States*, 518 U.S. 81 (1996), of such a significant degree as to frustrate the primary purpose of the Sentencing Guidelines, to wit: uniformity and consistency in the treatment of similar offenses and offenders. This conflict existed prior to this Court's decision in *Koon*, however, despite *Koon's* extensive discussion and clarification of the standards to be followed in ruling upon requests for downward departures, the conflicts among the circuits remains and, in some ways, has become more pronounced.

While the issue of downward departure based on a victim's wishes has not created a conflict among the circuits,[8]

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7. The Eleventh Circuit's opinion also rejected Mr. Drucker's contention that the record was, at the very least, ambiguous with respect to the district court's view of its authority on this issue. (App. A, *infra*, p. 8a).

8. Counsel has been unable to find any reported circuit court opinions dealing directly with this issue.

a determination of the issue is no less important to the proper administration of criminal justice in providing guidance to district courts in light of the growing interest in and focus on victims' rights, needs and concerns in the criminal justice process, both at the state and federal levels. The court of appeals did not reach this significant issue based on its determination that it lacked jurisdiction to review the merits of the district court's determination grounded upon its view that the district court declined to depart based on the facts presented rather than on the basis of a lack of authority. (App. A, p. 8a). We submit, however, that the record reflects that the district court believed it had the authority to consider the victim's wishes to reduce a sentence *within* the guideline range but that it did not have the authority to consider the victim's wishes to depart from the guidelines. Accordingly, the circuit court did have jurisdiction to consider the matter and to address the issues presented here.

1. In *Koon v. United States*, 518 U.S. 81, 113, this Court stated:

> The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This, too, must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the

> crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States district judge. Discretion is reserved within the Sentencing Guidelines, and reflected by the standard of appellate review we adopt.

It is within the context of these principles and the inquiry formulated by then — Chief Judge Breyer's inquiry, in *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993), adopted by this Court in *Koon* (518 U.S. at 95-96) that the district court's interpretation of what constitutes aberrant behavior sufficient to justify a downward departure must be viewed.

The only specific reference to aberrant behavior in the Sentencing Guidelines is found at Chapter 1, Part A, Section 4(d), part of a policy statement on probation and split sentences, where it is stated at the end of that subsection that "[t]he Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures." It is clear that the Sentencing Guidelines specifically contemplate downward departures based on "single acts of aberrant behavior" which have not otherwise been dealt with in the guidelines. Defining "single acts of aberrant behavior" has not, however, been quite so simple or clear.

Prior to this Court's decision in *Koon*, a split in authority arose among the various circuits in deciding how to interpret or define the phrase "single acts of aberrant behavior" to determine when the facts of a case would justify a downward departure on that basis. Representative of the one view is the Ninth Circuit's opinion in *United States v. Takei*, 941

F.2d 738 (9th Cir. 1991) describing an "aberrant behavior spectrum" pursuant to which aberrant behavior is to be determined and which can only be determined by a review of the totality of the circumstances. Moreover, in the Ninth Circuit's view the "single act" referred to more accurately describes the single criminal episode which, in most cases, would consist of a series of individual acts. (*Id.* at 743). Prior to *Koon*, this view was also adopted by the First and Tenth Circuits. *See United States v. Grandmaison*, 77 F.3d 555 (1st Cir. 1996); *United States v. Pena*, 930 F.2d 1486 (10th Cir. 1991).

The Third, Fourth, Fifth, Seventh, Eighth, Eleventh and District of Columbia Circuits refused to follow what they considered the Ninth Circuit's expansive view of aberrant behavior.[9] These cases basically follow the lead of the Seventh Circuit in the analysis and interpretation of the meaning of aberrant behavior as expounded in cases such as *United States v. Andruksa*, 964 F.2d 640 (7th Cir. 1992) and *United States v. Carey*, 895 F.2d 318 (7th Cir. 1990). These cases basically hold that to be considered aberrant behavior such actions must be "spontaneous and seemingly thoughtless." *United States v. Andruska*, 964 F.2d at 645. In addition, most of these cases also define "single act" in such a manner as to preclude a finding of aberrant behavior for

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9. *See United States v. Marcello*, 13 F.3d 752 (3d Cir. 1994); *United States v. Glick*, 946 F.2d 335 (4th Cir. 1991); *United States v. Burleson*, 22 F.3d 93 (5th Cir. 1994), *cert. den.*, 513 U.S. 911 (1994); *United States v. Williams*, 974 F.2d 25 (5th Cir. 1992), *cert. den.*, 507 U.S. 934 (1993); *United States v. Andruska*, 964 F.2d 640 (7th Cir. 1992); *United States v. Garlich*, 951 F.2d 161 (8th Cir. 1991); *United States v. Dyce*, 91 F.3d 1462 (D.C. Cir. 1996), *cert. den.*, 519 U.S. 1018 (1996).

downward departure purposes where a criminal activity involved more than one act.[10]

Subsequent to this Court's decision in *Koon*, the split among the circuits has continued. In the most recent cases, the Second Circuit has adopted the Ninth Circuit's approach. *Zecevic v. United States Parole Commission*, 163 F.3d 731 (2d Cir. 1998). On the other hand, the Third Circuit reaffirmed its support of the Seventh Circuit standard in *United States v. Paster*, 173 F.3d 206 (3d Cir. 1999), although in the case there arose within the panel a disagreement regarding the proper definition of "thoughtless" in the "spontaneous and seemingly thoughtless" standard leading to a dissenting opinion.

The only post-*Koon* case which seeks to apply this Court's analysis set forth in *Koon* is *United States v. Kalb*, 105 F.3d 426 (8th Cir. 1997). The *Kalb* court's use of this Court's *Koon* analysis appears to have moved the Eight Circuit away from the majority view and more towards the minority view recognizing that prior cases had "not accurately anticipated the Koon-mandated mode of analysis in a number of significant respects." (*Id.* at 429).

The present state of the law regarding aberrant behavior remains confused and in conflict. Among the unsettled issues that continue to exist based on the varying opinions of the many circuits that have addressed this issue are: which overall analysis to apply (pre- *Koon* versus post-*Koon*); which standard, if either, applies ("totality of the circumstances" versus "spontaneous and seemingly

10. In the case of *United States v. Simpson*, 7 F.3d 813 (8th Cir. 1993) the Eighth Circuit did, however, allow for the possibility that a "single act of aberrant behavior" could involve several acts.

thoughtless"); whether the aberrant behavior factor for downward departure can only be used where probation is available or in any sentencing situation; whether aberrant behavior is an encouraged factor or an unmentioned factor; and whether the term "single act" is limited to crimes which are effectuated only through one act or can refer to a single criminal episode which may consist of more than one act.

In the absence of a final resolution of this issue one of the primary purposes of the Sentencing Guidelines — that is, to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices"[11] — will be frustrated.

The frustration of this significant policy of the guidelines is amply demonstrated in the present case. The district court was of the view that the cases which were applicable to its consideration of the request for a downward departure on the basis of aberrant behavior were those following the Seventh Circuit analysis requiring that a "single act" be one act and further requiring it to be a "spontaneous and seemingly thoughtless" act. It thus did not view aberrant behavior as an applicable factor for downward departure. If, however, the district court had accepted the Ninth Circuit view it could have considered a downward departure on this basis and, given its comments during the sentencing proceeding, it appears likely that such a departure may have been granted.

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11. 28 U.S.C. § 991(b)(B).

It is the Petitioner's position that the district court erred in its adoption of the Seventh Circuit view in considering the aberrant behavior downward departure request. This would be so under either a pre-*Koon* or post-*Koon* analysis. Under a pre-*Koon* analysis the Ninth Circuit view, considering the principles and policies of the Sentencing Guidelines, is the more reasoned and reasonable view. It is a view that allows consideration of both the offense and the offender as opposed to the Seventh Circuit view which leads a district court judge into hair splitting analyses of how many acts a defendant engaged in in the course of a single criminal episode, how "spontaneous" his actions were and whether the actions were thoughtless or thoughtful.[12] Petitioner would further submit that a post-*Koon* analysis such as that engaged in by the Eighth Circuit in *United States v. Kalb*, *supra* is the more appropriate analysis. As such, the fact that the Sentencing Commission noted in Chapter 1, Part A, Section 4(d) of the Sentencing Guidelines that it had not dealt with single acts of aberrant behavior that might justify probation should not be viewed as limiting a district court's ability to consider aberrant behavior as a mitigating circumstance justifying a downward departure pursuant to 1995 U.S.S.G. Section 5K2.0. In that context, if either the Ninth Circuit or Seventh Circuit analysis retains validity after

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12. In this connection there is no language in the guidelines that gives any indication that spontaneity or thoughtlessness are the factors to be considered in determining whether an act was a single act of aberrant behavior. Indeed, as previously noted, at least one court has had recent difficulty in defining "thoughtless". *See United States v. Paster*, *supra*. Petitioner would submit that the discussion on this issue between the majority opinion and the dissent in *Paster* demonstrates the absurdity of trying to apply this type of standard to human conduct for the purposes of determining whether a downward departure is appropriate.

Koon, it is clearly the Ninth Circuit's approach that more closely approaches this Court's enunciation of the continuing validity and vitality of district court discretion in sentencing even within the parameters of the Sentencing Guidelines.

2. The comments of the sentencing judge indicate that he was of the view that he could consider the victim's wishes in determining a proper sentence *within* the guideline range, but not in departing downward from that range.[13] This determination by the sentencing court is contrary to the strictures of *Koon*.

The district court commented that it could not consider a victim's wishes for purposes of an upward departure because victim impact was already considered by the Sentencing Commission in the guidelines. (T. II 103-105). *See United States v. Holmes*, 1999 WL 768448 (3d Cir. 1999). The court, however, used this as part of its rationale as to why it could not consider the victim's wishes for purposes of a downward departure. This analysis is incorrect.

The Sentencing Guidelines do not consider the victim's wishes in any of its provisions for considering a downward departure. It is thus an unmentioned factor for purposes of downward departure analysis. *Koon*, 518 U.S. at 96.

As an unmentioned factor it is clear under *Koon* that the victim's wishes can be considered for purposes of providing

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13. At best, the sentencing judge's comments are ambiguous. *Cf. United States v. Nolan-Cooper*, 155 F.3d 221 (3d Cir. 1998); *United States v. Hadaway*, 998 F.2d 917 (11th Cir. 1993). Petitioner submits that if there is any ambiguity it should be interpreted as reflecting the sentencing judge's belief in his lack of authority given the judge's responsibility to adequately explain his sentence.

a downward departure. Treating the victim's wishes in a case such as this one as a request for leniency, such a request should be treated no differently and no less significantly than a jury's request for leniency or even a request from Congress for clemency, both of which have been held to be appropriate bases for downward departure in an appropriate case. *See United States v. Mickens*, 977 F.2d 69 (2d Cir. 1992); *United States v. Stoffberg*, 782 F. Supp. 17 (E.D.N.Y. 1992).

The importance of this question to the administration of justice is readily apparent when viewed in the context of the panoply of rights that have been created for victims in both federal and state courts in recent years with respect to the criminal justice process itself. For example, Rule 32(c)(3)(E), Federal Rules of Criminal Procedure, specifically provides the victim of a crime of violence or sexual abuse the right to make a statement to the court at the sentencing hearing and present any information in relation to the sentence he or she chooses. 18 U.S.C. § 3510 preserves the right of a victim to attend the trial of the defendant accused of the offense against the victim even where the victim may be entitled to attend the sentencing hearing and make a statement or provide information at the hearing. And 42 U.S.C. § 10606 sets out a series of victims' rights through the criminal justice process.

Similarly, there has been a move in state courts to assure victims' rights. For example, in Florida, Section 921.143, Florida Statutes, assures the victim of the right to make a statement to the court in sentencing proceedings. And Chapter 960, Florida Statutes, sets out an entire scheme relating to victim assistance and rights including obtaining the victim's views on sentencing and his or her right to be present and speak.

It would be totally incongruous to assert that victim impact can be considered for purposes of enhancing a sentence and engaging in an upward departure from the Sentencing Guidelines but that a victim's wishes cannot be considered in reducing a sentence and engaging in a downward departure from the Sentencing Guidelines. Yet, this is the result of the district court's view of its authority in the present case. Petitioner submits that this result is an erroneous one and is one that is likely to recur in the absence of definitive direction from this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 27, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-5095
Non-Argument Calendar

D.C. Docket No. 94-08085-CR-DTKH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD J. DRUCKER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

(September 27, 1999)

Before COX, HULL and MARCUS, Circuit Judges

PER CURIAM:

Ronald Drucker appeals his 12-months sentence for mailing threatening communications, in violation of

18 U.S.C. § 876. On appeal, Drucker argues that the district court erred by using $150,000 instead of $20,000 as the extortion amount. He also contends that the district court erred by not granting a downward departure under § 5K2.0, based on consideration of the victim's wishes. After review, we affirm.

I. BACKGROUND

A. Facts

Between July 23, 1993 and August 23, 1993 defendant Drucker sent a series of seven threatening letters to Charles Kane, a Florida attorney. The letters were sent to threaten Kane after Drucker learned that Kane was involved with Drucker's former girlfriend, Sally Labuy. The first letter warned Kane to "[k]eep far away from Sally or die." The second stated that Drucker had a copy of a pornographic video tape of Labuy and threatened to disclose the tape to the state bar and Kane's clients. A third letter made reference to money but did not mention an amount. After three more letters with pornographic references, Drucker demanded $150,000 in exchange for the tape of Labuy, and set a date for the exchange in front of a store at a shopping mall.

On the day set for the exchange, Kane did not got to the store. FBI surveillance, however, observed Drucker enter the mall parking lot and park near the designated store. Drucker exited his car, and entered the store. Approximately an hour later, Drucker left the store, and was seen looking back and forth before returning to his car and leaving. In a letter sent two days later, Drucker demanded $20,000 for the video tape,

and set a new date for the exchange at the same location. Kane was to park in a designated spot and leave an envelope containing the money in front of his car. After fifteen minutes, Kane was to go to another designated location in the parking lot and retrieve the tape.

On the day set for the second exchange, Kane arrived and left the money as instructed. Drucker was observed entering the parking lot, moving his car several times, and eventually leaving without retrieving the envelope. There is some evidence in the record to indicate that Drucker was seared away by the presence of a mall security officer. In a letter postmarked the same day, Drucker again demanded $20,000 for the tape and offered Kane "one last chance" to make the exchange. The letter contained additional threats to disclose information to the IRS and the police. Kane thereafter contacted Drucker's civil attorney in New York and advised him that he knew Drucker was responsible for the letters and that he had contacted the FBI. No further letters were sent.

B. Procedural History

On August 23, 1994, Drucker was charged in a one count information with the use of the mails to forward letters containing threats to injure the reputation of Kane and Labuy with the intent to extort $20,000 in violation of 18 U.S.C. § 876. On December 21 1994, Drucker entered a plea of guilty to this charge before the Honorable Daniel T.K. Hurley. According to the terms of the plea agreement, Drucker agreed to pay a fine of $10,000 and a $50 special assessment. The Government, in turn, agreed to recommend

that Drucker's sentence be calculated pursuant to United States Sentencing Guidelines § 2B3.3 (Nov. 1995). The Government was also to recommend that the sentence be imposed at the low end of the appropriate guideline range and that, pursuant to U.S.S.G. § 5CL1(c)(3), the sentence could be satisfied by a sentence of probation that included intermittent confinement, community confinement, or home detention.

The Pre-Sentence Investigation report (PSI) recommended that Drucker be sentenced under U.S.S.G. § 2B3.2, and that a two-level increase be assessed as a special offense characteristic because the amount demanded exceeded $50,000. Drucker filed objections to this report, arguing that U.S.S.G. § 2B3.3 was the applicable guideline because there was no threat of violence charged in the information and that the applicable amount of money was $20,000 rather than $150,000. Further, Drucker raised two possible grounds for a downward departure. The Government also filed objections agreeing that the appropriate guideline section was § 2B3.3.

An initial sentencing hearing was held on April 1, 1995. At this hearing, the district court determined that § 2B3.3 was the applicable guideline section and made an initial determination that the amount of money sought to be extorted was $150,000. In light of this finding regarding the amount of money, the court adjourned prior to imposing sentence in order to give Drucker an opportunity to consider withdrawing his plea. Drucker decided not to withdraw his plea, and a second sentencing hearing was scheduled for August 25, 1995.

Appendix A

Prior to the second sentencing hearing, Drucker filed a supplement to his sentencing memorandum, raising additional grounds for a downward departure. One of these additional grounds was the wishes of Kane, the victim. Drucker's argument was based upon a letter Kane sent recommending that Drucker not be sentenced to a period of imprisonment.

At the second sentencing hearing, Drucker called his treating psychiatrist to testify in support of a departure based upon aberrant behavior and diminished capacity. Dr. Caddy testified that he did not believe that Drucker was actually trying to get money or to disclose the tape, but rather, was just attempting to harass Kane. In addition, Dr. Caddy testified that Drucker told him he chose $150,000 in the first letter because he was cutting the words for the letter out of a newspaper, and that was the first dollar figure he found in the paper. The letter containing the $20,000 amount, on the other hand, was made using a label maker. Finally, Dr. Caddy suggested that Drucker's arrival at the designated location for the money exchanges could be viewed as an attempt to see if his letters had prompted any action on Kane's part rather than an attempt to actually collect the money.

Also in this hearing, the district court again determined that $150,000 was the proper amount to be considered. The court based this decision on findings that Drucker did indeed ask for this amount, and showed up at the scheduled time and place to collect the money. The court also denied Drucker's motion for a downward departure under U.S.S.G. § 5K2.0 based upon Kane's expressed wishes. Specifically, the court stated:

> I think that the court must consider, and is a highly relevant factor that the victim has made his expression. Certainly the court would need to consider the victim's wishes if they were the opposite. But I don't think someone realistically would say that this court could depart upward if a victim walked in in a sense of outrage and anger, as justified as that might be, to go up above the guideline because the victim impact is one of those factors that has been considered and made a part. On the other hand, in selecting a sentence within the guideline range, it seems to me highly relevant when a victim comes forward and says, these are my views . . . I think the court can certainly consider that, in particular, in those situations where the victim is saying, I'm satisfied with a lower sentence rather than a higher sentence. . . . So, I will consider Mr. Kane's letter, and I will consider it with respect to where on the guideline the appropriate sentence should be. But I will not utilize it to depart from the guidelines.

At the conclusion of this sentencing hearing, the Assistant United States Attorney asked for clarification of the grounds for denying the departure. Specifically, he asked "with respect to the grounds of downward departure argued by the defense, isn't the court's ruling based on the facts, present[ed] it was not granting the departure, and not because this Court felt it did not have the authority to conduct such a departure?" The court responded "[t]hat's correct." Drucker was sentenced to twelve months incarceration and one year of supervised release. Drucker's motion for bond pending

appeal was granted, and Drucker remains on bond at this time.

II. DISCUSSION

A. Amount of Money Demanded

Drucker first contends on appeal that the district court erred in determining that the extortion amount was $150,000 rather than $20,000.[1] This court reviews the district court's loss calculations for clear error. *United States v. Menichino*, 989 F.2d 438, 440 (11th Cir. 1993). In the instant case, Drucker contends that Dr. Caddy's testimony establishes that the inclusion of the higher figure in the first demand letter was merely happenstance, that his arrival at the proposed exchange site was not actually an attempt to collect the money, and that his actions should not be viewed as an attempt to secure the demanded money but rather as an attempt to harass Kane and Labuy. In light of this evidence, Drucker asserts that the use of the higher dollar figure does not accurately reflect the crime committed.

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1. Pursuant to U.S.S.G. § 2B3.3(b), if the amount obtained or demanded exceeds $2,000, the defendant's specific offense characteristic is increased by the corresponding number of levels from the table in § 2F1.1. Pursuant to that table, an amount over $120,000 results in a seven level increase in the offense level. An amount between $10,000 and $20,000, however, only results in a two level increase. *See* U.S.S.G. § 2F1.1. Thus, the district court's finding on this issue resulted in an additional five level increase to Drucker's offense level.

We disagree. Despite Dr. Caddy's testimony, there are sufficient facts in the record to support the district court's finding that the amount demanded was $150,000. Although Drucker did ultimately lower the amount demanded, it is not disputed that Drucker sent a letter requesting the $150,000 amount in exchange for the tape. Nor is it disputed that he showed up at the proposed time and date for the exchange. Thus, the district court's use of the $150,000 figure was not clear error.

B. Denial of Downward Departure

Drucker also challenges the district court's denial of his requested downward departure based upon Kane's wish that he not be imprisoned. Ordinarily, we will not review a district court's denial of a request for a downward departure. *United States v. Withrow*, 85 F.3d 527, 529 (11th Cir.), *cert. denied*, 519 U.S. 944 (1996). We will, however, review a district court's decision that it lacked the authority to depart downward on the requested basis. *See United States v. Hadaway*, 998 F.2d 917 (11th Cir. 1993). Here, Drucker contends that the record is at the very least ambiguous as to whether the district court improperly believed that it did not have the authority to depart on the basis of Kane's recommendation, and therefore this Court may review the decision.

The record does not support Drucker's contention, however. At the Government's request, the district court specifically agreed that it declined to depart based upon the facts presented, and not because it felt it did not have the authority to do so. Accordingly, this Court lacks jurisdiction

to review the merits of the district court's determination on this issue.

III. CONCLUSION

We conclude that the district court did not clearly err in determining the amount of loss under U.S.S.G. § 2F1.1. We further conclude that because the district court understood that it had the ability to depart downward under § 5K2.0, the merits of its refusal to grant a downward departure is not reviewable on appeal.

AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AUGUST 30, 1995 AND FILED AUGUST 31, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case Number: 94-8085-CR-HURLEY

UNITED STATES OF AMERICA

V.

RONALD J. DRUCKER
(#40279-004)

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

JACK A. GOLDBERGER, ESQ.
P.O. Box 3245
West Palm Beach, FL 33402
Defendant's Attorney

THE DEFENDANT:
X pleaded guilty to count one of the one count information on 12/02/94.

* * *

Appendix B

Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:876	Mailing threatening communications.	08/23/93	One

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

X It is ordered that the defendant shall pay to the United States a special assessment of $50.00 for count one, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any chance of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Appendix B

Defendant's Soc. Sec. No.: 051-26-5104	*August 25, 1995* Date of Imposition of Sentence
Defendant's Date of Birth: 05/10/33	s/ Daniel T.K. Hurley Signature of Judicial Officer Daniel T. K. Hurley,
Defendant's Legal Address: 17191 Shaddock Lane Boca Raton, FL 33487	U.S. District Judge Date: August 30, 1995

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of twelve (12) months as to count one of the single count information. The defendant shall be given credit for all pretrial detention served.

The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of one (1) year as to count one of the single count information.

Appendix B

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm or destructive device.

4. The defendant shall not have any direct or indirect contact with the victim in this case, Charles Kane, or any of Charles Kane's family members.

5. The defendant shall participate in an inpatient/outpatient mental health treatment program, as directed by the U.S. Probation Office. The defendant will contribute to the costs of services rendered (copayment) in an amount determined by the Probation Officer, based on ability to pay, or availability of third party payment.

6. The balance of the fine shall be due immediately or to be paid in such amounts and at such times as directed by the United States Probation Officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

Appendix B

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix B

FINE

The defendant shall pay a fine of $15,000.00. This fine includes any costs of incarceration and/or supervision.

X This amount is the total of the fines imposed on individual counts, as follows:

Count One of the Single Count Information.

X The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that:

X The interest requirement is waived.

The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

X in full immediately.

* * *

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.